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SUBJECT: RECOMMENDATION TO REMOVE PHILIPPINES FROM SPECIAL  
301 PRIORITY WATCH LIST

REF: A) MANILA 00832 B) MANILA 05068

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1. (SBU) Summary. Embassy recommends removing the Philippines from USTR's Special 301 Priority Watch List and placing it on the Watch List. The GRP has responded to the Special 301 out-of-cycle review by stepping up IPR protection. While there is still much to be done, it is important that the USG recognize recent progress in order to maintain momentum on IPR initiatives. Over the last year; the Optical Media Board has become fully operational and begun to assert its authority; overall enforcement actions and convictions, albeit from a small base, have increased; the GRP created a specialized IPR court, and the Intellectual Property Office has emerged as the lead agency on IPR by developing a core strategy and implementing several initiatives. Post further recommends that moving the RP from the Priority Watch List to the Watch List be done in tandem with a clear message to the GRP that without continued progress we would move the Philippines back onto the Priority Watch List in the following review. End Summary.

2. (U) This report is divided into two sections: Part I addresses the GRP's progress on IPR protection and Part II sets out post's recommendation.

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PART I: GRP PROGRESS ON IPR PROTECTION  
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3. (SBU) Earlier this year, when Embassy recommended that the RP remain on the Priority Watch List (PWL), we stated that three conditions should be met before the RP would merit removal from the PWL: 1) vigorous enforcement of the Optical Media Act; 2) expeditious prosecution of IPR violators for both new and pending cases, particularly focusing on domestic, large-scale pirate producers; and, 3) Congressional passage of the two pending copyright amendments and their effective implementation. The GRP has responded favorably to the out-of-cycle review (OCR) and has made a concerted effort over the last year to improve IPR protection. Although we have not seen as much progress as initially anticipated, the GRP has taken important, positive steps to improve its IPR protection regime.

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OPTICAL MEDIA BOARD FULLY OPERATIONAL  
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4. (SBU) Congress in February 2005 approved implementing rules and regulations for the Optical Media Act, which officially established the Optical Media Board (OMB) as the regulatory authority for the licensing of replicating machines and equipment and the materials used for making optical discs. Over the last ten months, the OMB has worked to assert its authority and define its role. Although the agency is now fully operational, it is, like many other agencies in the cash-strapped GRP, inhibited by a general lack of resources, funds, and trained staff. The OMB's budget remained stable this year, but rapidly rising overhead and other costs continue to squeeze out desired programs. The OMB estimates that it would need nearly to double its staff from 66 to 111 in order effectively to implement its mandate. However, despite severe resource constraints and major challenges ahead, the agency has emerged as a major player with respect to IPR protection. While the OMB has not yet achieved the level of "vigorous enforcement" we set forth as a goal, it is on its way to doing so.

5. (SBU) The OMB estimates that about 40 percent of pirated optical media purchased in the RP is produced domestically, while the other 60 percent is imported, mainly from China

and Malaysia. There are ten licensed production entities in the RP, of which four appear to be entirely legitimate; six appear to conduct both legitimate and illegitimate business. Since February, the OMB conducted raids on thirteen production lines and seized equipment, which involved three different pirate operations. However, due to an appellate court ruling that quashed a warrant needed to admit key evidence, the court dismissed charges against the owners of eight of these lines (involving pirated Sony Playstation software). The OMB contends that these IPR violators were well-connected and manipulated the judicial system.

16. (SBU) In June, the OMB started a campaign to remove pirated optical media from shopping malls by focusing initially on nine malls notorious for the sale of counterfeit goods. One mall responded by confiscating pirated optical media sold on the premises and turning them over to the OMB. Other malls were the subject of several OMB raids during the last half of the year. While pirated optical media products are still widely available in the Philippines, visiting officials from the US Trade Representative's Office and the Department of Commerce as well as Embassy Officers have noticed a decline recently in the overall quantity available in most malls.

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INCREASED ENFORCEMENT ACTIONS, NEW COURTS, BUT NO JUSTICE  
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17. (SBU) The Intellectual Property Office (IPO) reports that combined interagency enforcement actions resulted in 1,370 inspections, 869 search warrants, 26 alert/hold orders, and seizure of 4.6 million pieces of pirated goods. However, without aggressive prosecution, such actions remain a weak deterrent. The courts convicted four individuals in 2005 for IPR violations, compared to one conviction in 2004. These cases involved trademark infringement and carried sentences ranging from six months to five years imprisonment and 100,000 peso fines (USD 1,850).

18. (SBU) US rights holders usually do not pursue convictions and instead choose to settle out of court because it makes long-term business sense. The judicial sector remains a serious weakness in the chain of enforcement. Hence, formal prosecutions and convictions are few. US companies may be less willing to pursue cases in court when there is a good chance that the cases will be drawn out, resource intensive, and disappointing. According to the National Bureau of Investigation (NBI), RP law requires rights owners to file a complaint before any action can be taken. If they choose not to file, law enforcement agencies cannot act. For example, while conducting raids for other companies, NBI officials frequently encounter infringed goods for rights holders such as Nike, but since these companies do not file complaints, NBI has no authority to act with respect to those goods, its officials stated. The Intellectual Property Office (IPO) is coordinating a web-based enforcement database, which IPO officials hope to have operational by next June to enable the GRP to track such cases where clear IPR violations exist and rights holders choose not to take action. This will enable the GRP to keep track of the total number of potential IPR cases, regardless of whether a case is filed or not. Such statistics will be useful in understanding how rights holders handle IPR violations. This approach will help guide policy and improve resource allocation.

19. (SBU) Those cases that do move forward to prosecution do not seem to be earning many convictions. The IPO reports that there were 1,560 IPR cases as of October 2005, 510 of which have been disposed of, with 1,050 still pending. Earlier in December, the Supreme Court announced the formation of a specialized task force on anti-intellectual property piracy. Citing an insufficient caseload to justify an exclusive IPR court, the IPO and the Supreme Court agreed that it made more sense to create an international trade court, modeled on the Thai system, that would deal both with IPR and with other international trade issues such as money laundering. The new task force consists of three judges and seven prosecutors and will undergo specialized IPR training in coordination with the IPO. One judge and one lawyer will be sent to Bangkok to study the Thai system; other training initiatives are in the planning stages. IPO's Director General Adrian Cristobal underscored to EconOffs that this specialized IPR court will be the focal point of strengthened enforcement, but that IPO and the new court need time to demonstrate results.

10. (SBU) According to the Embassy ICE Attache, the number of raids, arrests, and convictions has increased, but the overall enforcement effort has not resulted in a significant deterrent effect to IPR violations. ICE nonetheless agrees with the concept of finding ways to recognize and reward the efforts underway to improve the IPR protection. ICE's perspective is that concrete enforcement results such as continuous significant criminal convictions could be and

should be improved considerably, a goal shared by Mission's Law Enforcement Working Group and its Economic Policy Group, both of which concur with the recommendation in paras 15-18.

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COPYRIGHT LAWS STILL PENDING IN CONGRESS  
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11. (SBU) Congress has not passed pending copyright legislation, which is needed fully to implement the WIPO internet treaties (WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), which the Philippines signed in July 2002. The Committee on Trade and Industry held hearings on House bills 322 and 3308 but did not vote before Congress recessed on December 14. No corresponding legislation has yet been submitted in the Senate. Political turbulence over recent months has complicated the Congressional agenda and interfered with numerous legislative initiatives of interest to the USG including those on IPR.

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INTELLECTUAL PROPERTY OFFICE TAKES THE LEAD  
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12. (SBU) The IPO deserves credit for the effort it has put forth over the past year. After assuming office in February 2005, Director General (DG) Cristobal formulated and implemented a comprehensive strategy to address IPR issues in the Philippines. Industry representatives have said that DG Cristobal has done more in the last year than his predecessors have done in the last five. The general consensus, though not unanimous, in the foreign and domestic business communities is that he has done a credible job and made significant progress. DG Cristobal has made a personal commitment to improve the IPR situation and to get the country removed from the PWL. He admits that there is still much to be done.

13. (SBU) Over the last year, the IPO emerged as the lead agency on IPR and substantially strengthened interagency coordination. The IPO has now established an active IPR Secretariat, housed in its office, and hosts a biweekly

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interagency meeting for agencies including OMB, the NBI, the Department of Justice, the Philippine National Police, and others. This restructuring appears to have greatly enhanced interagency communication and coordination.

14. (SBU) The IPO also started a public awareness and education campaign. It conducted over 50 seminars around the country, included IPR segments in weekly radio programs, made regular press releases on IPR issues, worked with the Department of Education to incorporate an IPR module in the basic civics curriculum, formed and trained a network of IP teachers within the university education system, and expanded its public website. The IPO has also worked with industry to create special enforcement campaigns within the software and cable industries, which resulted in seizure of \$350,000 worth of illegal software and cases filed against illegal cable operators in September and October.

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Part II: Post's Recommendation:  
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DELISTING WILL ADVANCE US INTERESTS ON IPR  
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15. (SBU) Embassy recommends removing the Philippines from the PWL and placing it on the Watch List (WL). The Philippines has responded favorably to the out-of-cycle review and has stepped up efforts over the last year to improve IPR protection. Embassy initially recommended the OCR in order to energize the GRP; this strategy appears to have succeeded. We are at a critical point where there is a fine line between simply maintaining pressure versus a strategy of maintaining that pressure while recognizing achievement. Some in the GRP are beginning to resign themselves to thinking that the country will be on the PWL indefinitely. GRP officials are sensitive to the country's Special 301 status and some, include DG Cristobal, have made a personal commitment to get the RP off the PWL. If we keep the Philippines on the PWL, we run the risk of numbing the GRP to the impact of being on the list and losing momentum on IPR initiatives. Taking the Philippines off the PWL will officially recognize positive efforts and provide an incentive to maintain progress.

16. (SBU) While the GRP did not produce all of the tangible results we had sought, the GRP has taken significant, positive steps in the right direction over the past year. From a strictly technical reading of the definition of a PWL country, the Philippines should probably remain on the list in that there is still not an adequate level of IPR protection or enforcement and market access for persons

relying on intellectual property protection remains constrained. However, it is important to recognize the significant progress the GRP has made as a means to leverage our bargaining power and recognizing expanded GRP actions on IPR issues.

17. (SBU) Should the USTR decide to delist the Philippines from the PWL, we would need to send a clear message to the GRP that this action is not a signal to relax efforts; we recognize progress but expect to see the momentum continue. Specifically, we should also call for: 1) increased enforcement; prosecution, and convictions; 2) continuing decline in availability of optical media and pirated cable; 3) decline in availability of trademark infringed goods; 4) increased resources to the OMB and other IPR agencies such as the IPR Enforcement Unit at the Bureau of Customs; 5) Congressional passage of the copyright laws and implementation; and 6) no passage of future legislation that would weaken IP protection.

18. (SBU) If the Philippines is unable to maintain its forward momentum on IPR, Embassy would have no hesitation about recommending that it be placed back on the PWL, even as soon as the next review. In the meantime, we are at a critical point where removal from the PWL would do much to validate the progress already made, maintain momentum and encourage further positive initiatives.

JONES